Supreme Court, U.S.
FILED
AUG 4 2000
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(3)

No. 99-1951

IN THE

Supreme Court of the United States

SANDRA BROWN, *et al.*,

Petitioners,

v.

PAYDAY CHECK ADVANCE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS THE CASH STORE MANAGEMENT, INC., THE CASH STORE, LTD., HAROLD L. AHLBERG AND TREVOR L. AHLBERG

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QUESTION PRESENTED FOR REVIEW

Whether under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, statutory damages are available under 15 U.S.C. § 1640(a) for an alleged technical violation of 15 U.S.C. § 1632(a)'s requirement that the "finance charge" be disclosed "more conspicuously" than other loan terms.

STATEMENT PURSUANT TO RULE 29.6

Respondent The Cash Store Management, Inc., now known as "Cottonwood Financial Management, Inc.," is the sole general partner of Respondent The Cash Store, Ltd., now known as "Cottonwood Financial Ltd." Cottonwood Financial Management, Inc. has no parent, and no publicly held company owns 10% or more of its stock. For ease of reference, the Cottonwood entities will be referred to herein by their former names.

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STATUTORY PROVISIONS

The following sets forth the statutory provisions relevant to Petitioner's claim against The Cash Store Respondents:

15 U.S.C. § 1632. Form of disclosure; additional information

(a) Information clearly and conspicuously disclosed; "annual percentage rate" and "finance charge"; order of disclosures and use of different terminology

* * *

. . . The terms "annual percentage rate" and "finance charge" shall be disclosed more conspicuously than other terms, data, or information provided in connection with a transaction, except information relating to the identity of the creditor.

15 U.S.C. § 1638. Transactions other than under an open end credit plan

(a) Required disclosures by creditor

For each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items, to the extent applicable:

* * *

(3) The "finance charge", not itemized, using that term.

15 U.S.C. § 1640. Civil liability

(a) Individual or class action for damages; amount of award; factors determining amount of award

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to the sum of —

(1) any actual damage sustained by such person as a result of the failure;

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction . . . .

* * *

In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of . . . paragraph . . . (3) . . . of section 1638(a) of this title . . . .

COUNTERSTATEMENT OF THE CASE

Petitioners' consolidated Statement of the Case does not attempt to set forth the facts alleged by one of the Petitioners, Valerie D. Smith, against one group of Respondents, The Cash Store Management, Inc., The Cash Store, Ltd., Harold L. Ahlberg, and Trevor L. Ahlberg (the "Cash Store Respondents"). Instead, the Statement of the Case groups together all of Respondents by erroneously claiming that each of the cases is "similar." Pet. at 4 n.1. Because the allegations by Ms. Smith against the Cash Store Respondents are factually distinct and vividly demonstrate the weakness of her claims, the Cash Store Respondents offer the following as a correct statement of the case against them.

Between June 13, 1998 and September 19, 1998, Ms. Smith obtained eight loans from The Cash Store Ltd. ("The Cash Store"), and on each occasion she signed The Cash Store's standard Consumer Loan Agreement. App. J to Pet. at J2. Significantly, as the district court held, the Consumer Loan Agreements accurately disclosed the "ANNUAL PERCENTAGE RATE," the "FINANCE CHARGE," the "AMOUNT FINANCED," and the "TOTAL OF PAYMENTS" to Ms. Smith in the manner required by the provisions of TILA. App. I to Pet. at I4.[1]

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1. Petitioner's reproduction of the district court's June 1, 1999 Memorandum Opinion and Order in Appendix I to the Petition contains a typographical error. Specifically, page I4 contains a sentence reading "There is *not* dispute that the disclosures on the loan documents themselves satisfy TILA." (emphasis added.) The actual opinion issued by the district court reads as follows: "There is no dispute that the disclosures on the loan documents themselves satisfy TILA."

Ms. Smith's Amended Complaint nonetheless alleged two violations of TILA and related state law claims against the Cash Store Respondents.[2] The Petition for Writ of Certiorari, however, seeks review of only one TILA claim — Ms. Smith's claim that The Cash Store violated 15 U.S.C. § 1632(a) when it provided her with a 3" x 4" cash register receipt at the end of each transaction, along with her copy of the 8½" x 11" Consumer Loan Agreement (hereinafter the "Receipt Claim"). According to Ms. Smith, these small cash register receipts violated 15 U.S.C. § 1632(a)'s requirement that the "finance charge" be disclosed "more conspicuously" than other terms because they obfuscated the disclosures on the various loan agreements. Ms. Smith alleged no actual damages in connection with her Receipt Claim and instead sought only statutory damages and attorneys' fees under 15 U.S.C. § 1640(a).

The district court, relying on *Brown v. Payday Check Advance, Inc.*, 202 F.3d 987 (7th Cir. 2000), held that statutory damages are not available for a violation of Section 1632(a)'s "more conspicuous" requirement and dismissed the Receipt Claim because Ms. Smith did not allege any actual damages. App. K to Pet. The Court of Appeals for the Seventh Circuit affirmed the dismissal of the Receipt Claim on April 18, 2000. App. C to Pet.

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2. On October 27, 1999, the Court of Appeals for the Seventh Circuit affirmed the dismissal of Petitioner's TILA claim that The Cash Store improperly disclosed the existence of a security interest in its Consumer Loan Agreements. *See Smith v. The Cash Store Mgmt., Inc.*, 195 F.3d 325 (7th Cir. 1999); App. J to Pet. On remand, the district court dismissed Petitioner's state law claims, pursuant to 28 U.S.C § 1367(c)(3), when it dismissed the TILA claim that forms the basis for the Petition. App. K to Pet. at K3.

REASONS FOR DENYING THE WRIT

I. THE *BROWN* DECISION CORRECTLY APPLIES THE PLAIN LANGUAGE OF 15 U.S.C. § 1640.

It is well settled that a statute's plain language should be enforced according to its terms. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). Because the Seventh Circuit's decision in *Brown* applies the plain language of Section 1640(a), the writ should be denied.

As the Seventh Circuit held, the first sentence in Section 1640(a) indicates that there are several exceptions to the general rule that a creditor may be liable for statutory damages in the event of a TILA violation. *Brown*, 202 F.3d at 990-91; App. A to Pet. at A5-A6. The exception that is fatal to Ms. Smith's claim for statutory damages is found in the penultimate sentence of Section 1640(a), which provides that "*[i]n connection with the disclosures referred to in section 1638* of this title, a creditor shall have a liability [for statutory damages] *only* for failing to comply with the requirements of . . . paragraph . . . (3) . . . of section 1638(a) of this title . . . ." 15 U.S.C. § 1640(a) (emphasis added). As the Seventh Circuit also held, the use of the word "only" in Section 1640(a) confines the violations for which statutory damages are available to a closed list. *Brown*, 202 F.3d at 991; App. A to Pet. at A6. In other words, statutory damages are available "only" for violations of the subsections enumerated in Section 1640(a). In this case, the only applicable subsection is Section 1638(a)(3), which requires that a creditor accurately disclose the finance charge.

It is undisputed, however, that The Cash Store did not violate Section 1638(a)(3) because the finance charge *was*

accurately disclosed to Ms. Smith in each of her Loan Agreements. App. I to Pet. at I4. Moreover, Section 1632(a)'s requirement that the finance charge be disclosed "more conspicuously than other terms" is a requirement that is "in connection with the disclosures referred to" in section 1638(a)(3) because the form of that disclosure (*i.e.*, that the finance charge be more conspicuous) is necessarily "in connection with" Section 1638(a)(3)'s requirement that the finance charge be disclosed in the first place. *See Brown*, 202 F.3d at 991; App. A to Pet. at A6 (holding that "[t]he more-conspicuous-disclosure obligation of § 1632(a) works '[i]n connection with the disclosures referred to in section 1638' "). Therefore, because the "more conspicuous" requirement of Section 1632(a) is connected with the disclosure referred to in Section 1638, but Section 1632(a) is not included in Section 1640(a)'s list of violations eligible for statutory damages, Ms. Smith's Receipt Claim was properly dismissed.

II. THE *BROWN* DECISION IS CONSISTENT WITH THE LEGISLATIVE HISTORY OF 15 U.S.C. § 1640.

Although Petitioner correctly concedes that TILA was amended in 1980 to prohibit the recovery of statutory damages under Section 1640 based on purely "technical" violations of the Act, she nonetheless attempts to twist the available legislative history concerning the 1980 amendments to support her Receipt Claim for statutory damages. Although resort to the legislative history would be improper given the unambiguous language of Section 1640(a), that history actually supports the *Brown* holding that statutory damages are limited to significant violations and are not available for violations of

Section 1632(a).[3] *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("the starting point for interpreting a statute is the language of the statute itself" and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive").

The Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, 94 Stat. 168, 175, 181 (1980) (the "1980 amendment"), became effective in April 1982 and changed TILA in two relevant respects. First, the 1980 amendment added to Section 1632(a) the requirement that the finance charge disclosure be "more conspicuous." Second, the 1980 amendment added the provisions limiting

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3. Petitioner's attempt to substitute her views of the legislative history and her beliefs as to what the law should be for the plain meaning of the statute was properly rejected by the Seventh Circuit. *See Brown*, 202 F.2d at 991-92; App. A to Pet. at A8 ("Whether Congress should have included [statutory damages for violations of Section 1632(a)], or would have done so had it thought more fully, does not affect interpretation of the law it actually enacted."). The Seventh Circuit's holding comports with this Court's mandate that courts should assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). Indeed, members of this Court have warned against using legislative history to interpret unambiguous statutory language. *See, e.g., Holder v. Hall*, 512 U.S. 874, 933 (1994) (cautioning against reading legislative history "selectively to support the result the Court intends to achieve") (Thomas, J., concurring); *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. . . . If one were to search for an interpretive technique that, on the whole, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history.") (Scalia, J., concurring in the judgment).

the availability of statutory damages to Section 1640(a). Contrary to Petitioner's assertions, however, the legislative history behind the 1980 amendments generally, and Section 1640(a) in particular, illustrates that Congress did *not* intend to allow statutory damages for technical violations such as her Receipt Claim. *See Brown*, 202 F.2d at 991; App. A to Pet. at A7 (the 1980 amendment to Section 1640(a) was added to "curtail damages awards for picky and inconsequential formal errors.")

For example, one Senate Report states that the rationale behind the amendments to Section 1640 was to "limit creditor civil liability for statutory penalties to only significant violations" as a means of protecting creditors from large statutory damage awards caused by "a steady stream of administrative interpretations and amendments, as well as highly technical judicial decisions." *See* S. Rep. No. 96-73, 96th Cong., 1st Sess. 1979, *reprinted in* 1980 U.S.C.C.A.N. 280, 280-81. In another passage, the same Senate Report demonstrates that Congress intended to

> narrow a creditor's civil liability for statutory penalties to only those disclosures which are of central importance in understanding a credit transaction's cost or terms. It is anticipated that this will eliminate litigation which is based on violations of a purely technical nature.
>
> In a 'closed end' transaction . . . *the creditor's civil liability for statutory penalties would be limited to disclosure of* the amount financed, *the finance charge*, the total of payments, the annual percentage rate, the number, amount, and due dates of payments, any security interest taken, and

> where applicable, the consumer's right of recission. *This is a significant reduction from the current scope of liability.*

Id. at 285 (emphasis added); *see also* S. Rep. 96-368, 96th Cong., 1st Sess. 1979, *reprinted in* 1980 U.S.C.C.A.N. 236, 251-52 (TILA was amended in order to "limit creditor civil liability for statutory penalties to only significant violations" because, among other reasons, creditors "have encountered increasing difficulty in keeping current with a steady stream of . . . highly technical judicial decisions," and "many creditors have sincerely tried to comply with the act but, due to its increasing complexity and frequent changes, have nonetheless found themselves in violation and subject to litigation").

Thus, in contrast to the legislative statements outlining the general purposes of TILA cited by Petitioner, the legislative history associated specifically with the amendment to Section 1640 supports the *Brown* court's holding that statutory liability applies *only* when there is a complete failure to disclose the "finance charge" and that statutory damages are *not* available when, as in this case, the finance charge was disclosed, but that disclosure was allegedly not "more conspicuous" than other disclosures. Indeed, this case represents the very type of litigation "based on violations of a purely technical nature" that Congress intended to eliminate.[4]

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4. Petitioner dramatically overstates the impact of *Brown* when she claims that it "eviscerates TILA and invites blatant evasion of the disclosure requirements." Pet. at 13. In making this statement, Petitioner ignores the fact that creditors can still be held liable for statutory damages under Section 1640(a) if they commit material

(Cont'd)

III. THERE IS NO CONFLICT BETWEEN THE *BROWN* DECISION AND THE DECISIONS OF THIS COURT OR OTHER UNITED STATES COURTS OF APPEALS.

Petitioner misrepresents the case law when she claims that there is a conflict between the Seventh and Tenth Circuits on the issue of whether statutory damages are available under Section 1640(a) for violations of Section 1632(a). In attempting to manufacture such a conflict, Petitioner relies solely on *Herrera v. First Northern S&L Ass'n*, 805 F.2d 896 (10th Cir. 1986). Pet. at 26-27. As the Seventh Circuit

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(Cont'd)
TILA violations. Moreover, even a creditor who violates Section 1632(a) can be liable for any actual damages and subjected to administrative enforcement. *See* 15 U.S.C. §§ 1607, 1640(a)(1). Thus, the Seventh Circuit certainly did not give creditors free rein to violate TILA. Furthermore, when making this prediction of doom, Petitioner conveniently ignores the fact that the legislative history confirms that Congress intended that a borrower would be limited to a remedy of actual damages or pursuing administrative enforcement in a case alleging a technical violation:

> [The 1980 amendment] is intended to restrict the scope of creditor civil liability for statutory penalties to only those disclosures which are of material importance in credit shopping. The committee believes that this will eliminate litigation based on purely technical violations of the act. *Civil liability for actual damages and administrative liability would continue to attach to all of the act's requirements.*

See S. Rep. 96-368, 96th Cong., 1st Sess. 1979, *reprinted in* 1980 U.S.C.C.A.N. 236, 267 (emphasis added); S. Rep. 96-73, 96th Cong., 1st Sess. 1979, *reprinted in* 1980 U.S.C.C.A.N. 280, 294 (same).

recognized, however, the Tenth Circuit did not discuss the relevant portion of Section 1640(a) in its opinion and, as a result, it did not "hold anything one way or the other about it." *Brown*, 202 F.3d at 992; App. A to Pet. at A9. Instead, *Brown* represents the first time that the limitation on statutory damages contained in Section 1640(a) has been addressed by a Court of Appeals.

Petitioner also misrepresents the case law when she claims that her interpretation of Section 1640(a) is "reinforced by case law." Pet. at 22-23. In support of this assertion, Petitioner cites to *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), and *Dixey v. Idaho First Nat'l Bank*, 677 F.2d 749 (9th Cir. 1982). Pet. at 22-23.

In *Beach*, however, this Court did not address the issue of when statutory damages were permitted under Section 1640(a), and instead held only that a right of recission defense may not be revived as a recoupment defense beyond the three-year expiration period. Before turning to the issue before it, the Court merely provided a broad overview of TILA in dicta when it stated:

> [T]he Act requires creditors to provide borrowers with clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and the borrower's rights. See §§ 1631, 1632, 1635, 1638. Failure to satisfy the Act subjects a lender to criminal penalties for noncompliance, see § 1611, as well as to statutory and actual damages traceable to a lender's failure to make the requisite disclosures, see § 1640.

Beach, 523 U.S. at 412. Because *Beach* simply did not address the issue of whether statutory damages are available for a purported violation of Section 1632(a), Petitioner's attempt to transform the above-quoted passage into a holding supporting her position does not withstand scrutiny.

As the Seventh Circuit recognized, the Ninth Circuit's opinion in *Dixey* also does not support Petitioner's interpretation of Section 1640(a). *See Brown*, 202 F.3d at 992; App. A to Pet. at A8-A9. *Dixey* was decided by applying the pre-1980 amendment version of TILA, and the court did not carefully examine the effect of the 1980 amendments to Section 1632(a) or Section 1640(a). Indeed, the *Dixey* court specifically noted that the 1980 amendments eliminated penalties for "technical violations" and suggested that its holding might have been different under the post-1980 amendment of TILA. 677 F.2d at 753.

Finally, Petitioner cites to two district court opinions and a bankruptcy opinion which she claims support her position that she is entitled to statutory damages for a violation of Section 1632(a). None of these opinions, of course, creates a conflict among the Courts of Appeals. Moreover, these opinions are either incorrect statements of the law or do not address the issue presented in this case. For example, the first district court opinion, *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264 (D. Del. 1999), was issued before the Seventh Circuit issued its opinion in *Brown*. Furthermore, rather than simply focusing on and applying the plain language of the statute, the *Johnson* court reached its conclusion by substituting its beliefs about Congress' intent when it enacted the 1980 amendment for the statutory text. *See* 82 F. Supp. 2d at 274, 276 (speculating that "it is highly doubtful that Congress would consider the failure to

follow the explicit requirements of the new law as a 'technical violation' " and concluding that merely because "Section 1632 precedes Section 1638, the court presumes that Congress intended a violation of Section 1632(a) to be treated as a violation of Section 1638(a)(3) and 1638(a)(4)"). Moreover, as demonstrated above, the *Johnson* court's beliefs as to Congress' intent when it enacted the 1980 amendment are actually contrary to the available legislative history. Therefore, the district court opinion in *Johnson* opinion does not create an issue worthy of writ consideration.

The other two lower court opinions that Petitioner claims stand for the proposition that courts "have required lenders to pay statutory damages" if they fail to comply with Section 1632(a), *Pendleton v. American Title Brokers, Inc.*, 754 F. Supp. 860 (S.D. Ala. 1991), and *In re Cook*, 76 B.R. 661 (Bankr. C.D. Ill. 1987), merit little discussion. Pet. at 12. As in *Herrera*, neither the *Pendelton* court nor the *Cook* court discussed Section 1632(a) or Section 1640(a)'s limitation on statutory damages. Therefore, those cases simply do not contain any holding bearing on the issue before this Court.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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